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No. .

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

JAMES HILL,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.*

1. Whether the court below erred in denying petitioner's motion to suppress the fruits of a warrantless search and seizure derived from the warrantless interception and monitoring of point to point radio voice transmissions by the Federal Communications Commission and the United States Coast Guard, conducted in violation of the Federal Wiretap Act, the Federal Communications Act, and the Fourth Amendment of the United States Constitution.

2. Whether the court below erred in denying petitioner's motion to dismiss based on the deportation of a potential witness in violation of the due process and compulsory process clauses of the Fifth and Sixth Amendments to the United States Constitution.

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* In addition to petitioner Hill, Robert Rose was a party to the appeal in the United States Court of Appeals for the First Circuit. This petition relates, however, only to James Hill.

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UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

James Hill petitions for a writ of certiorari to review the decisions of the United States Court of Appeals for the First Circuit entered on January 27, 1982, and on March 15, 1982.

Introduction.

James Hill seeks review of the affirmance by the United States Court of Appeals for the First Circuit of orders of the United States District Court for the District of Massachusetts denying his motion to suppress the fruits of the warrantless search and seizure of a vessel and his motion to dismiss.

The court of appeals decision is novel in several respects and presents this Court with an opportunity to address several issues of first impression.

Petitioner contended that the interception of a point to point radio transmission (which is to be distinguished from a transmission from one point but intended for broadcast to the general public) by the Federal Communications Commission (hereinafter, "FCC"), and by the United States Coast Guard, violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq., (hereinafter, the "Federal Wiretap Act") and the Fourth Amendment to the United States Constitution. As a result of these interceptions, the Coast Guard searched a vessel, seized a quantity of marihuana, and arrested the petitioner. The decision below represents the first time that a federal court has determined that the scope of protection of the Federal Wiretap Act depends upon the content of the intercepted communications. It also represents the first interpretation of the scope of the FCC's obligations with respect to the interception of radio communications since the passage of the Federal Wiretap Act. The court of appeals found that the FCC's enabling statute, 47 U.S.C. § 605, was substantially amended by the Federal Wiretap Act so as to virtually exclude radio broadcasts — including point to point transmissions intended for private use — from the ambit of the Federal Wiretap Act.

The motion to dismiss was based on the precipitous deportation of a government witness without giving petitioner (or his codefendants) an opportunity to interview the witness. The decision below adds yet another voice to the debate among the various Courts of Appeals over the question of whether or not the deportation of a potential witness can constitute a violation of the due process and compulsory process clauses of the Fifth and Sixth Amendments to the United States Constitution. It implies a higher standard of proof than exists in other

circuits, requiring a defendant to show "that the deported witness would have been likely to offer meaningful evidence not obtainable from other available witnesses." (A. 26a.)

Opinions Below.

The petitioner, James Hill, was convicted on February 19, 1981, at a jury-waived trial on stipulated facts, of possession with intent to distribute a quantity of marihuana (in violation of 21 U.S.C. § 955(a) and 18 U.S.C. § 2), conspiracy to carry out that offense, and conspiracy to import a quantity of marihuana into the United States (in violation of 21 U.S.C. §§ 952, 960, and 963).

Prior to his conviction, petitioner filed a motion to suppress the fruits of a warrantless search and seizure of a vessel known as the *Judith Lee Rose*, and a motion to dismiss, alleging a denial of compulsory process and due process. After a hearing, a United States magistrate issued certain findings of fact and conclusions of law, recommending denial of the motion. (A copy of that opinion is reproduced in the Appendix at A. 1a). The district court issued an oral opinion affirming the magistrate's conclusions and recommendations on February 6, 1981. (A copy of the transcript constituting the Court's decision is reproduced at A. 12a). The Court denied the petitioner's motion to dismiss on December 22, 1980 (a copy of the transcript constituting the Court's decision is reproduced at A. 8a). After a motion for reconsideration of the motion to dismiss was filed, the Court reaffirmed its formal denial of the motion on February 6, 1981 (a copy of the transcript constituting the Court's decision is reproduced at A. 9a).

An appeal was taken and denied by the United States Court of Appeals for the First Circuit in a decision issued on January 27, 1982 (a copy of that opinion is reproduced at A. 17a).

A petition for rehearing was denied on March 15, 1982, with the Court amending a small portion of its original decision (a copy of that opinion is reproduced at A. 25a).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions.

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ..

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [n]or shall any person . . . be deprived of life, liberty or property, without due process of law . . ..

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall . . . have compulsory process for obtaining witnesses in his favor . . ..

18 U.S.C. § 2510(a) provides in pertinent part:

> Definitions
>
> As used in this chapter —
>
> . . . . . .

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

18 U.S.C. section 2511(2)(b) provides in pertinent part:

Interception and disclosure of wire or oral communications prohibited

. . . . . .

2(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

47 U.S.C. section 605 provides in pertinent part:
Unauthorized publication or use of communications.

[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . .

Statement of the Case.

On October 29, 1981, an employee of the monitoring branch of the enforcement division of the FCC intercepted what appeared to be suspicious point to point radio voice transmissions* emanating from two points in the Atlantic Ocean, thereby suggesting a violation of the FCC's regulations which limit the use of the "ham" radio operator's band to point-to-point transmissions on land. While the ocean location of the transmissions were confirmed in less than an hour, the FCC, nonetheless, continued to overhear the communications rather than commencing FCC enforcement proceedings. After five hours they turned the information over to the United States Coast Guard (A. 18a).

The United States Coast Guard then began monitoring (simultaneously with the FCC) over the course of the next two days, commenced a criminal investigation, and, based solely on the overheard communications, located the source of the transmissions — the two boats that were subsequently boarded and searched. In the early morning hours of October 31, 1980, situated approximately five hundred yards from the vessels and more than 100 miles off the United States coast, the Commander of the Coast Guard Cutter charged with this investigation saw individuals on the two vessels (the *Judith Lee Rose* and the *Diana Cecilia*) transferring bales which, based on his previous experience he believed to be marihuana. All twenty-one individuals on the two boats were arrested, and the boats and their contents, searched and seized. (*Id.*)

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* Unlike radio broadcasts which are transmitted from one "point" but which are intended for reception by any listener in the general public, point to point transmissions have a designated recipient at another, specific location, and are used for conversations between individuals. Indeed, overseas telephone calls are transmitted point to point in the form of radio waves.

On November 1, 1980 the government issued complaints against twelve of those arrested, charging various statutory violations of the Controlled Substances Act (21 U.S.C. § 841 et seq.), including, inter alia, conspiracy to import marijuana. On November 3, 1980 ten Colombians were similarly charged. On the same day the government turned over one of the Colombian nationals from the *Diana Cecilia*, Edgar Danies-Ocampo, Jr., to the Immigration and Naturalization Service. He was taken immediately to New York for an unusually expeditious deportation (A. 18a-19a). The petitioner did not discover Mr. Danies-Ocampo's whereabouts until November 7, 1980, when the government obtained indictments against all of the complained of individuals except for this man and an American who agreed to testify for the government.

The district court and the Magistrate denied petitioner's motion to suppress, finding that the FCC's monitoring and disclosure fit within the exception provision of 18 U.S.C. § 2511(2)(b). The district court also found that the FCC's initial monitoring was proper and that the subsequent overhearing and disclosure were justified under the "plain view" doctrine. The district court made no finding as to the propriety of the Coast Guard's monitoring (A. 5a-6a, 13a-16a).

The court of appeals affirmed the district court's conclusions, ruling that these particular point to point transmissions were outside the ambit of protection of the Federal Wiretap Act because the content of the communications suggested that the suspects did not have a subjective expectation of privacy — in part because the communicants used code from time to time — and because the communications took place over a "ham" radio frequency to which large numbers of people have access (A. 19a-22a).

Petitioner's motion to dismiss on the grounds of the denial of compulsory process and due process, stemming from the government's deportation of Edgar Danies-Ocampo, Jr. without provision of notice of the deportation or an opportunity to

interview the individual to the accused was also denied (A. 8a-12a). While the government offered no justification for its action, the district court found that there was no constitutional violation because the individual was a juvenile rendering deportation appropriate, and because petitioner had not demonstrated prejudice from the witness' absence. The court of appeals found that while the petitioner did not have to demonstrate prejudice, he did have to show that the "deported witness would have been likely to offer meaningful evidence not obtainable from other available witnesses." (A. 26a).

Reasons Why the Writ Should be Granted.

A. *The Decision Below Leaves Point to Point Radio Voice Transmissions Wholly Unprotected.*

The decision below raises crucial, and unresolved, questions concerning the type of communications within the ambit of the Federal Wiretap Act and the Fourth Amendment to the United States Constitution and the scope of protection afforded by those provisions. The court below found that the point to point voice transmissions between two vessels involved here were not oral communications entitled to protection under the Federal Wiretap Act or the Constitution — that the speakers did not have a subjective expectation of privacy that was objectively reasonable — largely because the nature and content of the communications, including the fact that the communicants used code from time to time to disguise the content of their communications, suggested that the suspects did not have a subjective expectation of privacy and because these communications took place over a "ham" radio frequency, as to which a large number of people have access.

Petitioner submits that the analysis of both the "subjective" and "objective" bases for an expectation of privacy in these

transmissions is not only flawed but has serious implications in other spheres.* Because the individuals in this case, understanding the limitations of radio waves, took precautions to keep their conversations from being publicly communicated, the court below took the position that these conversations were not entitled to protection. Under this theory, had the defendant in *Katz* v. *United States*, 389 U.S. 347 (1967), used code in his telephone booth — understanding that while his communications should be protected, governments sometimes overstep their limits — his perspicacity would have deprived him of constitutional protection. If the ordinary long distance telephone caller — assuming that the government routinely monitors such calls, or that they may be intercepted by others since they are transmitted via radio waves — takes pains to talk in code, muffle his voice, or not identify himself, those actions could be viewed as an admission that the form of communication selected was imperfect; that he did not have a subjective expectation of privacy. Similarly, a political dissenter, who saw himself on a government "enemies" list, who knew that the government acts illegally at times, and as a result, used code even on a private domestic telephone call, could be seen as conceding that he did not possess a subjective expectation of privacy.

On the open seas, point-to-point communications via radio waves like the ones at issue here, are the only form of intership communication. Telephone cables obviously do not exist. Rather, radio transmissions at sea function like telephonic communications. Indeed, overseas telephone communications are also transmitted via radio waves virtually identical to

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* The monitoring plainly does not fall within 18 U.S.C. § 2511(2)(b) as being "in the normal course of [an FCC official's] employment" and in discharge of his statutory monitoring responsibilities. Rather, the FCC far exceeded these monitoring responsibilities by becoming a law enforcement arm, continuing to intercept these transmissions long after the agency confirmed a violation of its own regulations.

the ones involved in the instant case. In time, it is to be expected that more and more communication by cables will be eliminated in favor of communication by radio waves. The ramifications of such changes are clear. Applying the theory espoused below, technological changes will all but eliminate the privacy of oral communications between parties who do not limit themselves to face-to-face conversations, but rather continue to communicate from distant points while taking whatever precautions they can to safeguard their privacy.

To be sure, radio wave transmissions are an imperfect medium of communication. However, until the instant decision, the case law distinguished between those who used radio waves to make public broadcasts — *i.e.* as in the case of a radio station — and those who used radio waves to communicate between two points — themselves and another. *See United States* v. *Sugden*, 226 F.2d 281 (9th Circuit 1955). That is a distinction which is consistent with prior case law and should be maintained by this Court; the scope of protection depends upon the circumstances of the communication, and not its content.

The rejection of petitioner's expectation of privacy as objectively reasonable eliminates with a single stroke forty years of protection for this form of radio communication. All radio waves are "accessible to a large number of people;" *ergo* (according to the court below) this genre of communication may not be considered private.

But since 1934, point-to-point communications of precisely the type considered here have been protected by the Federal Communications Act, 47 U.S.C. § 605. Section 605 explicitly *includes* communication by "wire or radio" and prohibits their interception except in certain carefully defined circumstances — broadcast to the general public, monitoring in the normal course of FCC monitoring, etc. The case law construing § 605 has dealt with transmissions virtually identical to the ones at

issue here; *e.g. United States* v. *Laughlin*, 226 F.Supp. 112 (D. D.C. 1964); *United States* v. *Fuller*, 202 F.Supp. 351 (N.D. Cal. 1962); *United States* v. *Sugden*, 226 F.2d 281 (9th Cir. 1955).

This precedent and this statute are dismissed by the Court on the grounds that 18 U.S.C. § 2510 et seq., which simultaneously amended § 605, diminished the scope of § 605's protection. The sole support for this statement is found in the amendment to § 605 which prefaced its prohibition against disclosure with the words "[e]xcept as authorized by [Title III]." With that amendment, the Court found that the requirements of subjective and reasonable expectations of privacy and procedural protections set forth in Title III were incorporated in § 605 and *vice versa* (A. 22a).

This foundation is hardly an adequate predicate for the total extinction of § 605's protections as to a category of communication specifically mentioned in the statute — and never specifically excised even in the 1968 amendments.

Moreover, the exception clause in no way lends credence to this interpretation. It prohibits disclosure "except as authorized by Title III." By its terms it refers to the provisions in Title III which convey *authority*, which entitle government officials to do certain things, and not to the provisions of Title III which pertain to the scope of coverage of the statute. Title III's innovation, in fact, was in the procedures it spelled out for obtaining a warrant to intercept communications. Thus, the reasonable interpretation is that this warrant procedure was not integrated into § 605.

Finally, even if the Federal Wiretap Act did affect the coverage of § 605, it is inconceivable that that effect would have been a narrowing of coverage. To the contrary, the congressional hearings discuss at some length the importance of a statute conveying the widest possible protections for oral and wire communications.

B. *The Court Below Erroneously Imposed a Standard for Determining When the Deportation of a Potential Witness Constitutes a Due Process and Compulsory Process Violation That is More Stringent than Many Other Circuits.*

The court below excused the Government's deportation of the witness, Edgar Danies-Ocampo, without affording petitioner an opportunity to determine whether he would be a useful witness, because there was "no indication that the government based its decision to deport Danies-Ocampo on an assessment of his value as a witness" since the prosecutor "testified" that he never obtained any statements from Danies-Ocampo (A. 23a-24a). The implication of the Court's language is that petitioner must somehow show the motivation for and basis of the government's decision, a standard considerably more stringent than the test employed by other courts of appeals. Deportation without reason, because the government assumes — without interview — that the witness is fungible is nevertheless a violation of due process and compulsory process. The prosecutor cannot be permitted to determine the value of a witness to the defense solely by making his own, *ex parte*, evaluation; that a witness appears minor to him does not justify denying access to the defendant.

In response to petitioner's petition for rehearing the Court below amended its opinion to require a showing that the deported witness would have been likely to offer meaningful evidence not obtainable from other witnesses. In the instant case, the deported witness was an unindicted eyewitness to the actions involved in the arrest and search of both boats who was not cooperating with the government. Lacking any readily apparent Fifth Amendment problems, he may have been willing and able to provide the petitioner with evidence concerning the search, his knowledge or lack of knowledge as to the

destination of the cargo, the extent of the petitioner's participation, etc. If that is not sufficiently meaningful evidence to have met the standard espoused below, the requirement is simply prohibitive.

At present there is a conflict among the Circuits. The Ninth and Seventh Circuits require a minimal showing of prejudice — such as a representation by counsel as to the possible effect of the witness on the trial issues. *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974); *United States* v. *Calzada*, 579 F.2d 1358 (7th Cir. 1978). The Fifth Circuit requires a more substantial showing of prejudice. *United States* v. *Avila-Dominquez*, 610 F.2d 1266 (5th Cir. 1980). Accordingly, this Court's guidance is necessary to resolve the current conflict and provide constitutionally proper and uniform standards throughout the criminal justice system.

Conclusion.

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

JAMES HILL, ET AL.,

CRIMINAL
No. 80-00360-G

FINDINGS AND RECOMMENDATION
ON
MOTION TO SUPPRESS

January 21, 1981

ALEXANDER, M.

This matter was assigned to me by Order of Reference. At a hearing held on the motion the Government was represented by Judd Carhart, Assistant United States Attorney, and the defendants by Nancy Gertner, Esq., Martin Weinberg, Esq. and Constance Rudnick, Esq. This Court hereby makes the following recommendations as to Findings of Fact and Conclusions of Law with regard to said motion.

1. Mr. King Hall is a twenty-one year employee of the Federal Communications Commission (hereinafter referred to as F.C.C.). Specifically, Mr. King is employed within the monitoring branch of the enforcement division of the F.C.C. His responsibilities entail enforcement of radio regulations — ensuring persons abide by radio laws.

2. On October 29, 1980, Mr. Hall heard, during the normal course of his employment, suspicious voice transmissions

— suspicious in that the voices were discussing, in code, a rendezvous on a land to land frequency when the frequency should have been on sea to sea.

3. Mr. Hall subsequently informed his supervisor who informed the General Counsel of the F.C.C.

4. The information regarding the voice transmissions was then given to the Coast Guard.

5. Lieutenant William R. Ashforth is Chief of the Maritime Law Enforcement Section — Intelligence Division of the Coast Guard.

6. At approximately 6:00 P.M. on October 29th Lt. Ashforth received a call from Coast Guard Intelligence reporting a violation of the F.C.C. regulations, specifically use of the Ham Operator Band which is intended for land side use, not marine usage.

7. The F.C.C. indicated the points at sea where the violations were occurring.

8. Lt. Ashforth was informed, specifically, by Special Agent Hammit, who Ashforth testified was experienced in Intelligence, that traffic had been intercepted which seemed to be moving in the ocean, disguising identities, talking in code on a doper band, and alternating English and Spanish.

9. Lt. Ashforth testified that normally when legitimately using the Ham Band, persons will use their names or official call sign.

10. Lt. Ashforth also heard coded transmissions.

11. Commander Armand Chapeau was next informed regarding the voice transmission violations.

12. Armand Chapeau is a Commissioned Commander in the Coast Guard on the CUTTER ALERT.

13. On October 30th Commander Chapeau, while on board the CUTTER ALERT, as part of his continuing law enforcement activities, listened to two "stations" setting up a rendezvous off Cape Cod and Georges Bank.

14. At approximately 10:30 P.M. on October 30th, Commander Chapeau observed on radar one or two vessels in the rendezvous area.

15. The weather was clear and cool; overcast at 5,000 feet with visibility of eight miles or more.

16. At approximately 11:30 P.M., the Commander proceeded to about one mile from target and viewed through binoculars two vessels tied together.

17. At approximately five hundred yards from the target, the Commander saw the two vessels transferring bales which he believed to be marijuana based on his previous experience in viewing such bales.

18. The Commander advised the vessels that his ship was a Coast Guard vessel and to stand by to receive a boarding party.

19. One of the vessels which later became known as the JUDITH LEE ROSE proceeded away from the CUTTER ALERT at a high rate of speed.

20. The Coast Guard chased the JUDITH LEE ROSE whose occupants were viewed throwing bales over the side.

21. After using a siren, a 50 caliber machine gun was fired cross the bow of the JUDITH LEE ROSE.

22. The JUDITH LEE ROSE then stopped and the Coast Guard boarded, saw bales on the vessel and secured the ship.

23. The DIANA CECELIA, a steel boat, had to be towed. The tow took one and one half days — during which, the tow line broke. There were high seas and winds during the tow.

24. Michael Schafersman is a Coast Guard Officer who boarded the JUDITH LEE ROSE at approximately 1:00 A.M. on October 31, 1980.

25. Officer Shafersman saw some bales before boarding and while forward on main deck.

26. Officer Shafersman saw one particular bale of plastic and burlap. The corner was broken on the bale. Schaferson

saw a brownish greenish leaf substance; a substance which he had seen before thereby forming an opinion that the substance was marijuana.

27. A field test was subsequently conducted which can confirm and did, in fact, confirm marijuana.

28. The JUDITH LEE ROSE was boarded without a warrant.

29. Pursuant to the stipulation attached hereto, Steven Sussman, Esq. on behalf of Joseph J. Baxley, Joyce Wheeler Poulin, Esq. on behalf of John M. Smith and Judd J. Carhart, assistant United States Attorney adopt all evidence presented at the Suppression Hearings.

CONCLUSIONS OF LAW

The defendants maintain that the F.C.C. was prohibited from monitoring the airwaves for the purposes and in the manner done in the instant case. The defendant relies on *Bubis* v. *United States*, 384 F.2d 643 (9th Cir., 1967), *cert. den.*, 394 U.S. 1015 (1969) in support of its position that the length of time of monitoring by the F.C.C. was unreasonable. However, in *Bubis*, *id.*, the length of time in which the telephone company was involved in monitoring was approximately three months, December 23, 1965 until March 24, 1966. In the case sub judice, even if the F.C.C. monitored for approximately five (5) hours, for the purpose of enforcing F.C.C. radio law, *not* as defendant asserts, for the purpose of a criminal investigation, comparatively, the time involved was de minimis. Moreover, the facts involved in *Bubis* are totally distinguishable and inapplicable to the case at bar.

The F.C.C. clearly through its enabling statute, 47 U.S.C., Section 151, *et seq.* has authority to monitor conversations of

the type involved in the case sub judice. See *United States* v. *Sugden*, 226 F.2d 281 (7th Cir. 1976), *affd.* 351 U.S. 916; *Reston* v. *F.C.C.*, 492 F.Supp. 697 (D.C.D.C. 1980).

As to the contention that the F.C.C. was prohibited from disclosing the fruits of the monitoring to the Coast Guard, 18 U.S.C. Section 2511(2)(b) authorizes:

> "It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained."

As this Court has previously found, Mr. King Hall of the F.C.C. was monitoring transmitted radio communications in the normal course of his employment. Thus, no violation of the above-entitled statute exists.

Additionally, this Court finds that an expectation of privacy was not violated by the actions of the F.C.C. on the airwaves. This Court recognizes the privacy rights generally accorded radio transmissions. *Reston*, *supra*. However, the ships in question were illegally using the airways in violation of F.C.C. regulations. The threshold issue to be considered is whether the airwaves were being *legally* utilized, giving rise to a reasonable expectation of privacy. See *Sugden*, *supra* at 285. How can one have a reasonable expectation of privacy when using a land to land frequency in code when a sea to sea or marine frequency was the only frequency to which one was entitled? Obviously, such an expectation is clearly not con-

templated by case law or statute. The defendants cannot now be heard to complain that their privacy rights have been violated because an F.C.C. employee engaged in his normal course of employment overhears surreptitiously coded transmissions on the wrong F.C.C. band and then reports such transmissions. An acquiescence to such a complaint would have an egregious frustrating result in attempting to enforce congressionally mandated regulation of our airwaves. Therefore, the F.C.C. did not as a matter of law violate the defendants' rights.

Concomitantly, the Coast Guard's short term monitoring precedent to the search and seizure of the vessels, without a warrant, was not unconstitutional. Certainly exigent circumstances existed to obviate the need for a warrant. Vessels, like motor vehicles, are extremely mobile, thereby justifying the search in this case. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d. 564 (1971); *United States* v. *Laughman*, 618 F.2d 1067 (4th Cir. 1980); *United States* v. *Miller*, 589 F.2d 1117, 1125 n.3 (1st Cir. 1978); *United States* v. *Kleinschmidt*, 596 F. 2d 133, 136 (5th Cir. 1979); *United States* v. *Whitmire*, 595 F. 2d 1303 (5th Cir. 1979) as quoted in *United States* v. *Blair*, 493 F. Supp. 398, 415-416 (D.Md. 1980).

As indicated by the facts, the officers on board CUTTER ALERT, prior to boarding and while on board, observed sequentially the dumping of bales, and the existence of bales containing marijuana. Moreover, when the Coast Guard identified itself the ship fled. This Court could not contemplate a clearer case wherein a search falls within the analagous motor vehicle exception to the warrant requirement. *United States* v. *Blair*, *id.*

Moreover, once the officers were legitimately on board the vessel, the facts adduced indicate that one bale was torn, and the marijuana stored therein was in *plain view*. The cases

are well-settled that the seizure of such evidence is permissible. See *Harris* v. *United States*, 390 U.S. 234 (1968).

In light of the afore-mentioned and based on the totality of the circumstances, it is the recommendation of this Court that the defendants' Motion to Suppress all Physical Evidence be denied.

/s/ _____
UNITED STATES MAGISTRATE

. . . . . .

[26]

. . . the Court also denies the motions to dismiss insofar as they are based upon the unavailability of the two witnesses mentioned or other related grounds, such as the violation of the defendants' rights under the Sixth Amendment, and any other similar points. I will talk about these one at a time. There are different positions.

As far as the 17-year-old boy is concerned, I think that each case has to stand on its facts, and this might be a test case of

[27]

the rule that the defendants need not show prejudice, because here, in my view, prejudice is so clearly lacking that dismissal here should be automatic if there is to be a dismissal; it would have to be automatic. In my view, a dismissal of this case on this ground, that this 17-year-old non-English-speaking Colombian was permitted to go back to his home, would exalt form over substance in an extreme way.

I do think the facts are highly relevant. Here, isn't it interesting to contrast this situation, like the one in Rosario or those similar cases, where there is an obligation on the government to produce the one man who probably brought the parties together for a narcotics transaction.

The Supreme Court in Rosario and other courts in similar cases have said that the information that can be obtained from a witness in that circumstance is not important. He is probably the only person not a party to the transaction who is available as a witness.

Here, there are twenty witnesses. There is nothing to distinguish this young man from any of the others except his youth, so I should think that if the Court were to dismiss a case of this nature on a ground like that, it would be properly the subject of incredulous newspaper editorials; not that we are

supposed to decide cases on the basis of lay commentary, but rather on the basis of some appreciation for what people think we are doing. So I do think that there is no basis for dismissal on that first point.

[28]

With respect to Uncle Ricardo, if the government had sent him back as they did the boy, I think defense counsel would have a far different point to make, because here you have a man who could speak English, for one thing, and he was on the computer; he is the only one on the American vessel; and he comes up with the ability to raise $50,000 bond; so he looks on the surface like a ringleader, or a leader.

If the government had sent him away, I do think these cases that you cite from the Fifth, Seventh, and Ninth Circuits would be far more applicable, and I would treat that differently than the nephew, Eduardo, but the denial of the motion on this ground is because it was over the government's objections that the man had his bail reduced.

The government surely cannot be thought to be a party to his leaving, and you never know, maybe the man will walk in here this afternoon at 2:30. He is on bail. Maybe the surety company, which has as much of an interest in his whereabouts as anyone else, will have the man back here. I don't know. But I certainly don't think the government can be charged with any responsibility for his having had his bail reduced and having defaulted on his bail.

So those motions are denied.

. . . . . .

[3]

The next one is a motion for reconsideration of denial of motion to dismiss on grounds of denial of compulsory process and due process, and there, I set that down for hearing this morning, because I do have a couple of questions on that. I have

never understood from Mr. Cahart why they sent this man, whoever he was, back to South America. What is the reason?

MR. CARHART: Your Honor, the defendant was an illegal [4]

alien.

THE COURT: He was an illegal alien.

MR. CARHART: Yes, your Honor.

THE COURT: Any different from the others?

MR. CARHART: No, your Honor, except that the others were held and paroled into the United States for purposes of prosecution. As to Mr. Danies Ocampo, prosecution was declined by the government, at which time he was of necessity turned over to Immigration.

THE COURT: Well, that is words, but I don't know. Now, it could be that you don't have a say in why he was selected to go back to South America. Maybe he was, you know, an informant, for all I know.

MR. CARHART: I would be happy to tell the Court all I know about the person.

THE COURT: Well, you should, because so far as — my rulings thus far have been based on the assumption that he was sort of fungible or there was some reason to send him back, but I have never been sure what the reason was. Maybe you thought the man — I don't know — was someone other than he was.

MR. CARHART: The reason he was sent back — Let me give the Court the factual background as I know it to be. Mr. Danies Ocampo was, I believe, 17 years old.

THE COURT: Seventeen?

[5]

MR. CARHART: Yes, your Honor.

THE COURT: Well, now — Yes.

MR. CARHART: After discussing the prospect of prosecuting the 17-year-old Colombian with the U.S. Attorney, the First

Assistant U.S. Attorney, it was our determination that the prosecution should be declined, and we did decline prosecution.

THE COURT: You mean because of his youth?

MR. CARHART: Because of his youth, yes, your Honor.

THE COURT: Well, all right.

MR. CARHART: There was no statement to my knowledge and I would be the one who would know of such a statement. No statement was taken from him that I have ever seen, your Honor. He is not nor has he been an informant. We have no information gleaned from Mr. Danies Ocampo. The reason he was sent back and not — The reason he was sent back simply is there was no prosecution authorized and no need to hold him.

THE COURT: Now, what is a juvenile? Would he be a juvenile?

MR. CARHART: Yes, your Honor. To my understanding, he would be a juvenile.

THE COURT: What is a juvenile, under 18?

MR. CARHART: Under 18.

THE COURT: And are there special provisions about the prosecution of juveniles?

[6]

MR. CARHART: Yes, your Honor, I believe there are. The person could have been — We could have proceeded against him individually as a juvenile. The government chose not to do so.

THE COURT: Well, I mean special things about — you have got to get clearance from the Attorney General's Office, things like that. Aren't there lots of special rules governing prosecutions of juveniles?

MR. CARHART: Yes, there are, your Honor.

THE COURT: Well, that is that, then.

I have a question now for Miss Gertner or anyone else who wants to answer, if you do want to answer, from the defense

counsel's table, and that is, did you people interview any of the other crew members, that is, those who pleaded guilty in this case?

MISS GERTNER: We asked each of the lawyers involved if we could interview their clients, and they all declined. We had available in our firm someone who was in a position to speak Spanish so we could interview those who had problems with English, and they all declined.

THE COURT: Well, then, that is that. Now, what the Court does — Does anyone want to be heard further on this motion to renew the denial about Mr. Danies Ocampo?

[No response.]

THE COURT: Then I deny the motion for reconsideration,

[7]

and reaffirm my former denial. I am satisfied that he was sent back because he was a juvenile and it was decided for no sinister reasons not to prosecute him but to send him back to his family.

We now turn to the other motions, and first, I think, should be the motion to suppress the physical evidence. On that, I received all sorts of filings. I think the first matter to address is whether the findings of the magistrate should be modified. I think the most important thing is to get the facts straight and then see where the law directs from there.

Some of these points made by defense counsel seem to me offhand to have merit. I am talking about the facts. What I wish defense counsel had done was state what findings the defendants think should have been made by the magistrate on these matters. The way it comes to me now is that there are a lot of objections, three categories of objections, to the magistrate's findings of fact.

Well, the record should indicate the facts, and if the magistrate omitted something that the defendants think is important, I think those facts should be reflected, or if the magistrate

ever, in reciting the facts, makes a mistake, there should be no problem in the government's agreeing that the mistake should be corrected. That is the government's obligation.

. . . . . .

[51]

[Pause.]

THE COURT: Well, the ruling is that the objections are overruled, and the Court adopts the magistrate's recommendation as an order of the Court, that is, denying the defendants' motion to suppress the evidence of the bales of marijuana that were seized aboard these two vessels and any other physical evidence.

The reason is basically the one that was discussed during the hearing, which was the code, the use of the code. The fact that the communicators at times lapsed into noncode does not affect the significance at least that I feel should be placed on the transmissions as having been in code.

The conclusion I draw from that is that the transmissions were not oral communications within the meaning of Chapter 119 §§ 2510 and 2520. The first section defines oral communication as follows: "uttered by a person, exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

[52]

Close the quotes.

The fact that the transmission was in code leads me to find that the transmitters were trying to keep their transmission from detection by a governmental or other law investigative agency. Indeed, it was simply because they expected that the communication would be intercepted that they used the code, in my view of this, so there is at the outset lacking the expectation called subjective expectation within the meaning of the Katz case, Katz versus United States, 389 United States Reports 347, a 1967 case.

Similarly, there was no expectation of privacy objectively, in my view, because of the language of the statute: Is it here reasonable to think that they anticipated, under these circumstances, that their communication would be private. I say that by the objective standard also, the communication does not fall within the group protected under the principles enunciated in the Katz decision.

The cases are not that helpful, really. I think Reston is distinguishable because it did not involve a crime. It involved the FCC's being asked to disclose some recordings of transmissions from Jonestown, in Guyana, under the Freedom of Information statute.

So the Court's first finding is that these transmissions were not oral communication within the meaning of the statute.

[53]

The second point where the Court agrees with the magistrate and overrules the objections has to do with the exception clause in Section 2511(2)(b), which I think is here applicable despite the problems and points raised by the defendants.

No question but what the normal course of the monitor's employment led to his intercepting these transmissions in the first instance. It is undisputed that at least for a few minutes, he was acting in the normal course of his employment, and the question becomes what is the normal course of employment and the discharge of monitoring responsibilities when a person properly monitoring a transmission comes across evidence leading him to suspect that a crime is in progress?

In my opinion, which matches that of the magistrate, I think his normal course is to continue to confirm his suspicion and, if he comes across information that is clearly of importance to a federal law enforcement agency, to disclose that information.

I think, in other words, that the exception clause does apply here. The authority and right and duty, indeed, of the FCC

employee I think is analogous to the authority of investigative officers under the plain-view doctrine, which is invoked so often in search and seizure cases.

I think further and find further that there is no obligation on [54]
the part of an FCC monitor to terminate his monitoring as soon as he has come across what is arguably sufficient evidence of an FCC violation. The argument that the monitor must turn off the monitoring receiver as soon as he might arguably have evidence of an FCC violation does not, in my view, set the limits to his authority. He might do that, but I believe that the law does not require him to do it.

The defense argument here is similar to the argument that is now seen and raised in some cases that once investigating agencies get enough evidence to arrest a person, they must arrest him thereafter, and may not wait until he goes into his house so as to get a warrant that would enable them to search the home at the time of the arrest, or that they may not continue their investigation in order to get additional evidence.

The problem with that type of argument, which I think is similar to the argument of the defendants here, is that we, that is, lawyers and judges, in criminal cases have the benefit of hindsight. In hindsight, of course, it might be argued that there was sufficient evidence to arrest the man before searching his house. In hindsight, it can be argued that a five-minute or a one-hour or a less than five-hour monitoring would have been sufficient to prove the violation of the FCC rules and regulations, but that is hindsight.

[55]

I think, in sum, that Mr. Carhart's point that there was a proper dual purpose is a valid argument. The FCC found illegal use of the airwaves, in the sense of a land channel being used for maritime transmissions. I cannot see where in the statute, at least, there is any requirement that they terminate

the monitoring at a particular early point. The statute does say "in discharge of the monitoring responsibilities." I think, as I have stated, that that can have a dual — that in this instance there was a dual purpose: to discharge the monitoring responsibilities and also to disclose to law enforcement the evidence of a separate offense which was come upon not by design but by accident.

I do think the policy behind the doctrine that law enforcement officials may seize contraband in plain view is significant in justifying the disclosure here. I think the disclosure is justified both by Section 2611(2)(b) and by an analogy to the plain-view doctrine in search and seizure cases.

What is the obligation of a law enforcement officer when he comes across strong evidence of an offense being committed? It strikes me that unless he is entitled to inform the proper law enforcement authorities of what he has come across by chance, I think it is important that he was not out exceeding his authority in the first instance, but if he is acting pursuant to his original authority and comes across evidence of a crime, I [56]
do think he has a duty to advise other, proper law enforcement officials.

Otherwise there is, as defense counsel has argued here, a strange gap in the law — "strange" is my word, not defense counsel's word, but I say it would be strange for the law to forbid the use of evidence of a serious offense under such circumstances.

So for those reasons, the Court subscribes to the magistrate's report. I think the magistrate's report is a good one as a matter of law. I think it is a good analysis. I can put somewhat different emphasis on some of the points, and have relied more than the magistrate on the fact that the transmissions were in code, probably, but I do believe that the evidence was properly seized on board these vessels and that its use at the trial is permissible. So that is my ruling on the motion to suppress.

. . . . . .

United States Court of Appeals
For the First Circuit

No. 81-1140

UNITED STATES OF AMERICA,

APPELLEE,

v.

ROBERT ROSE, SR.,

DEFENDANT, APPELLANT.

No. 81-1258

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES HILL,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. W. ARTHUR GARRITY, JR., *U.S. District Judge*]

Before
COFFIN, *Chief Judge,*
DAVIS, *Judge,**
BREYER, *Circuit Judge.*

John Wall and *Nancy Gertner,* with whom *Ronald Kovner, Cullen & Wall, Harvey A. Silverglate,* and *Silverglate* and *Gertner* were on joint brief, for appellants.

John H. LaChance, Assistant United States Attorney, with whom *Edward F. Harrington,* United States Attorney, was on brief, for appellee.

January 27, 1982

* Of the U.S. Court of Claims, sitting by designation.

COFFIN, *Chief Judge.* Appellants James Hill and Robert Rose seek reversal of their convictions for possession with intent to distribute marijuana and for conspiring to import and distribute marijuana. 21 U.S.C. §§ 952, 955(a), 960, 963; 18 U.S.C. § 2.

On October 29, 1981, an employee in the monitoring branch of the enforcement division of the Federal Communications Commission (FCC) intercepted what appeared to him to be a suspicious radio transmission. It was a point-to-point communication transmitted on the "ham" radio operator's band, but contrary to FCC regulations which limit that band to transmissions on land, it seemed to originate from and be sent to points off the Atlantic coast. Although the FCC confirmed within an hour that the transmission was from a marine source, the employee did not institute actions to rectify the violation of the regulations but instead continued to listen and take notes. He had concluded that the transmissions referred to contraband trafficking.

After five hours of overhearing, FCC officials turned the information accumulated through the interception over to the United States Coast Guard which, after listening further, directed one of its cutters to the location of the suspected "drop site". As the cutter approached in the dark on the night of October 30, it saw two vessels side by side, apparently transferring bales of marijuana from one to the other. Upon hearing the Coast Guard's announcement of its presence, the people on board the boats started throwing bales overboard. When the Coast Guard boarded after seeing bales on the ships, it arrested twelve Americans and ten Colombian nationals.

Two days after the arrest, the government turned one of the Colombians, Edgar Danies-Ocampo, Jr., over to the Immigration and Naturalization Service for deportation, a

deportation that occurred with more haste than usual. The government pointed to Danies-Ocampo's status as a 17-year-old minor to justify its decision to drop charges and instigate deportation proceedings.

Appellants argue that the trial court should have granted their pretrial motion for suppression of the marijuana because the interception by the FCC, its decision to turn the information obtained by interception over to the Coast Guard, and the Coast Guard's subsequent interception violated Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 *et seq.*, the federal wiretapping statute. In addition, they appeal the trial court's denial of their motion to dismiss the indictment. They had moved to dismiss on the grounds that the government's decision to deport Danies-Ocampo without notice to appellants violated their rights to compulsory process and due process because it denied them the opportunity to interview the only individual who witnessed the events, was not indicted, and had not agreed to be a witness for the government.

In ruling on appellants' claim that the interception of the point-to-point transmissions violated Title III and therefore required suppression of the marijuana seized as a result, the threshold and, in this instance, the determinative issue is whether the communications intercepted come within the protection of the Act. Although Title III establishes extensive restrictions on the interception of communications, it applies only to those communications deemed to be either "wire" or "oral" communications. *See* 18 U.S.C. § 2511. Obviously not a wire communication, a point-to-point radio transmission is protected only if it falls within the definition of oral communication—"any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such exception", 18 U.S.C. § 2510(a). This definition has been interpreted to require that the speaker have a subjective expectation of privacy that is objectively reasonable. *See*

Holman v. *Central Arkansas Broadcasting Co.*, 610 F.2d 542, 544-45 & n.3 (8th Cir. 1979); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1206 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States* v. *McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978); S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Admin. News 2112, 2178.

The trial court, trying the case without a jury, found that appellants had neither a subjective expectation of privacy nor a reasonable objective expectation. Applying the clearly erroneous standard of review, as we must when a determination of fact such as this is appealed, *United States* v. *Hall*, 488 F.2d 193, 198 (9th Cir. 1973), we cannot find that the trial court erred. The manner in which the communications were transmitted indicates that appellants were aware that their communications were likely to be intercepted. They switched frequencies during the course of their transmissions; they did not identify the stations they were operating as required by the FCC; they did not identify themselves; and lastly, they chose to use code from time to time to disguise the content of their communications. This combination of factors is more than adequate to allow us to uphold the trial court's finding that appellants could not have a genuine subjective expectation of privacy. Appellants make the obvious argument that the very extent of the precautions taken by them to hide their identity and message denotes their subjective expectation of privacy. But so to conclude would confuse expectation and hope. Faced with the only available, rather exposed means of communication, appellants chose to take precautions because they did not expect privacy but hoped for the best.

Even if the subjective expectation had been proven, that expectation would not have been reasonable when judged by an objective standard. Appellants were broadcasting on the ham radio frequency, commonly known to be a means of communication to which large numbers of people have access as receivers. A reasonable person would not expect that words

uttered over the ham radio frequency would be heard only by those few individuals for whom the communication was specifically intended. *See United States* v. *Sugden*, 226 F.2d 281, 286 (9th Cir. 1955) (dictum), *aff'd*, 351 U.S. 916 (1956). Although we acknowledge that circumstances justifying an expectation of perfect privacy are not necessary for protection to attach, *see Lee* v. *Florida*, 392 U.S. 378, 381 n.5 (1968), the objective expectation of privacy in these circumstances is too minimal to deserve recognition.

The fact that Title III has a provision specifically allowing FCC employees to monitor communications in the normal course of their employment, 18 U.S.C. § 2511(a)(b), does not change our finding that the transmissions at issue were not communications falling within the scope of Title III. Although appellants argue that this exception for FCC employees creates the expectation that FCC officials will not monitor communications in other instances, this reasoning approaches the problem from the wrong direction. Only if the communication is one that exhibits the required expectations of privacy does the exception for FCC employees come into play. That exception cannot create an expectation that then affects the scope of the coverage of Title III.

Nor does the existence of an independent statutory provision regulating the divulgence of the contents of radio communications, 47 U.S.C. § 605, alter our conclusion. Prior to the passage of Title III, two-way radio communications were protected from interception or disclosure under § 605 regardless of the ease with which others could monitor the transmissions or any expectation of privacy. *United States* v. *Sugden*, *supra*, 226 F.2d at 286; *United States* v. *Laughlin*, 226 F. Supp. 112, 114 (D.D.C. 1964). When Congress passed Title III, however, it simultaneously amended § 605 to state that § 605 does not apply to communications that may be intercepted and disclosed under Title III by prefacing § 605's prohibition against disclosure with the words "[e]xcept as authorized by [Title III]". Appellants argue that the amend-

ment was not intended to reduce the degree of protection that radio communications had previously enjoyed and that therefore individuals may continue to operate two-way radios with an expectation of privacy even if their transmissions may be easily overheard.

Although Congress did not explicitly recognize that the amendment would allow the interception and disclosure of radio communications previously protected, the legislative history states clearly that "The regulation of the interception of wire or oral communications in the future is to be governed by the proposed new [Title III]". S. Rep. No. 1097, [1968] U.S. Code Cong. & Admin. News, *supra*, at 2196; *see United States* v. *Clegg*, 509 F.2d 605, 611 n.10 (5th Cir. 1975). Moreover, the statutory mandate contained in "except as authorized by [Title III]" cannot be avoided. We recognize that the protective shield of § 605 is significantly diminished in scope by incorporating the requirements of subjective and reasonable expectations of privacy and procedural protections set forth in Title III. *Cf. United States* v. *Hall*, *supra*, 488 F.2d at 195 n.3. On the other hand, we can see no justification for affording, as appellants would have us do, greater protection to radio broadcasts made recklessly or desperately with no realistic expectation of privacy than to face-to-face conversations that do not happen to satisfy the definition of an "oral communication" protected under Title III.

Given our conclusions that the intercepted communications were transmitted with neither a subjective nor a reasonable objective expectation of privacy, we affirm the denial of appellants' motion to suppress the evidence.*

* Because we find that the intercepted communications do not fall within the protection of Title III, we need not review the trial court's assumedly alternative findings that the FCC employee acted within the scope of the statutory exception allowing FCC employees to monitor communications in the normal course of their duties and that he could convey the intercepted information to the Coast Guard.

Appellants also assert that the government's deportation of Edgar Danies-Ocampo without giving appellants an opportunity to determine whether he would be a useful witness violated their rights to due process and compulsory process. On the same day that the government decided not to seek an indictment against Danies-Ocampo because he was a juvenile, it turned him over to Immigration and Naturalization Service authorities who immediately took him to New York. The trial court denied appellants' motion to dismiss the indictment, finding that the deportation had not caused appellants any prejudice because other witnesses existed who could offer similar accounts. Upon reconsideration of the denial, the court added that it was satisfied that the government had ordered deportation only because Danies-Ocampo was a juvenile. As a juvenile, he would have been prosecuted separately and subject to specialized procedural requirements.

Other courts have recognized that deportation of a potential witness can constitute a violation of due process and compulsory process that requires dismissal. *See generally United States* v. *Valenzuela-Bernal*, 647 F.2d 72 (9th Cir.), *cert. granted*, 50 U.S.L.W. 3331, 3334 (Nov. 3, 1981); *United States* v. *Avila-Dominques*, 610 F.2d 1266 (5th Cir. 1980); *United States* v. *Calzada*, 579 F.2d 1358 (7th Cir.) *cert. dismissed*, 439 U.S. 920 (1978); *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971). This case, however, does not present the situation where a constitutional violation has occurred. The Ninth Circuit, which first recognized that prosecutors should not be allowed to deport witnesses without allowing the other party access to the witness, explained that "[t]he thrust of [this rule] is to prevent the basic unfairness of allowing the government to determine which witnesses will not help either side and then to release those witnesses, for all practical purposes, beyond the reach of the defendant". *United States* v. *Tsutagawa*, 500 F.2d 420, 423 (9th Cir. 1974). In this instance there is no indication that the

government based its decision to deport Danies-Ocampo on an assessment of his value as a witness. The prosecutor involved in the decision testified before the trial court that he never obtained any statements from Danies-Ocampo about the events that had transpired. Without these statements, such an assessment would have been impossible. In the absence of the reason for the rule, we find no cause to apply the rule.

We also find lacking a sufficient showing that appellants were prejudiced by their inability to interview Danies-Ocampo and possibly present him as a witness. Courts have disagreed over whether prejudice can be assumed from the mere fact of inaccessibility. *Compare United States* v. *Valenzuela-Bernal, supra*, 647 F.2d at 74, *with United States* v. *Avila-Dominques, supra*, 610 F.2d at 1270. Although our conclusion above prevents us from having to decide this issue, we think that a defendant must at least show that the deported witness would have been likely to offer meaningful evidence not obtainable from other available witnesses. *Cf. United States* v. *Picariello*, 568 F.2d 222, 227 (1st Cir. 1978) (defendant must show prejudice when evidence destroyed). The trial court was justified in finding inadequate appellants' generalized argument that Danies-Ocampo's absence was prejudicial because he was one of only two witnesses present when the events occurred but not under indictment, and the only one of those two who had not agreed to cooperate with the government. Counsel's more specific speculations at argument, even if timely, were not persuasive.

Affirmed.

United States Court of Appeals for the First Circuit

No. 81-1140

UNITED STATES OF AMERICA,
APPELLEE,
v.
ROBERT ROSE, SR.,
DEFENDANT, APPELLANT.

No. 81-1258

UNITED STATES OF AMERICA,
APPELLEE,
v.
JAMES HILL,
DEFENDANT, APPELLANT.

MEMORANDUM AND ORDER
Entered March 15, 1982

Before Coffin, *Chief Judge*,
Davis, *Judge**,
Breyer, *Circuit Judge*.

Points II and III of appellants' petition for rehearing do not persuade us that we erred in our opinion. Part IV, however,

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* Of the U.S. Court of Claims, sitting by designation.

does persuade us that we should narrow our holding with respect to the government's deportation of Edgar Danies-Ocampo. We therefore amend the penultimate paragraph of the opinion by striking the last three sentences and substituting the following:

> "The decision stemmed from the desire to return promptly to his own country a seventeen year old youth, without questioning or prosecution. The youth was one of twelve persons apprehended on a vessel other than that carrying appellants; the others were held for prosecution. On this record there is no suggestion that the government was motivated by any assessment of the usefulness of the youth as a witness to either side. Although we recognize that purity of the government's motive may not be a sufficient response to a claimed deprivation of testimony of a deported witness and that a defendant may not be required to make a detailed offer of proof, we think that a defendant must at least show that the deported witness would have been likely to offer meaningful evidence not obtainable from other available witnesses. See *United States* v. *Avila-Dominquez*, 610 F.2d 1266, 1270 (5th Cir. 1980) ("some suggestion . . . as to how the deported witnesses might advance the cause of revealing the truth")."

The opinion will continue with the seventh line before the mandate.

By the Court,

M. Gallup
Clerk

[cc: Messrs. Wall and LaChance. Ms. Gertner. West Publishing, Commerce Clearing House, NCAIR and Mass. Lawyers Weekly.]

[redacted]

[redacted]

[redacted]

QUESTIONS PRESENTED

1. Whether evidence derived from monitoring petitioner's illegal radio transmissions must be suppressed under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*

2. Whether the government violated petitioner's right to due process or to compulsory process by deporting a 17-year old illegal alien witness.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2131

JAMES HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17a–24a) is reported at 669 F.2d 23. The amended opinion of the court of appeals (Pet. App. 25a–26a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1982. A petition for rehearing was denied on March 15, 1982. The petition for a writ of certiorari was filed on May 17, 1982, and therefore was out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 963 (Count 1), possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 955(a) (Count 3), and conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Count 4). He was sentenced to concurrent terms of five years' imprisonment on each count, to be followed by a three-year special parole term on Count 3. The court of appeals affirmed (Pet. App. 17a–24a).

1. The facts as set forth in the opinion of the court of appeals (Pet. App. 17a–26a) and the magistrate's memorandum (Pet. App. 1a–7a) are as follows. On October 29, 1980, King Hall, a Federal Communications Commission (FCC) employee, intercepted, in the normal course of his employment, a suspicious radio transmission (*id.* at 1a). The transmission was a point-to-point broadcast—some of it in code—on the "ham" radio operator's frequency, originating from and being sent to points at sea off the Atlantic coast (*id.* at 2a). The radio frequency used, however, was limited under the FCC regulations to transmissions on land.

Hall monitored the intermittent transmissions for approximately five hours and concluded that the transmissions were referring to contraband trafficking (Pet. App. 18a). FCC officials then turned the information Hall had accumulated over to the United States Coast Guard, and it began to monitor the transmissions. The Coast Guard determined that the transmitting parties were arranging some sort of rendezvous off Cape Cod and Georges Bank (*id.* at 2a, 18a).

On October 30, 1980, the Coast Guard cutter *Alert* proceeded to the suspected "drop site" (Pet. App. 3a, 18a). As it approached the rendezvous point, the com-

mander of the *Alert* observed two vessels side by side, transferring what appeared to be bales of marijuana from one vessel to the other. When the officers on the *Alert* identified themselves and ordered the vessels to stand by to receive a boarding party, the people on board the two vessels began throwing bales overboard. In addition, one vessel, the *Judith Lee Rose*, attempted to escape. The vessel stopped, however, when the Coast Guard fired a machine gun blast across her bow (*ibid.*). Petitioner and eight others were arrested on board the *Judith Lee Rose*. Thirteen aliens were arrested on the second vessel, the *Diana Cecelia*.

2. In the district court, petitioner moved to suppress all statements made by him over the radio and all of the marijuana seized[1] on the ground that the monitoring of the radio transmissions was in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. IV) 2510 *et seq.*[2] Adopting the findings of the magistrate, the district court found that the radio transmissions were not protected oral communications within the meaning of 18 U.S.C. 2510, because petitioner lacked both a subjective and objective expectation of privacy (Pet. App. 13a–14a). Further, the court found that the interception of the transmission by the FCC employee was made in the normal course of his employment and in discharge of the FCC's monitoring responsibilities in accordance with the ex-

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[1] A total of 256 bales of marijuana were seized from the two vessels.

[2] 18 U.S.C. 2510(2) provides:

> "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

ception to Title III delineated in 18 U.S.C. 2511(2)(b) (Pet. App. 14a).[3] Accordingly, the court concluded that the disclosure of the transmissions to law enforcement authorities was proper (Pet. App. 12a–16a).

Petitioner also moved in the district court to dismiss his indictment on the ground that he had been denied his rights to compulsory process and due process when the Immigration and Naturalization Service deported to Colombia a 17-year old illegal alien—Edgar Danies-Ocampo—who had been arrested on board the *Diana Cecilia*. The United States Attorney decided not to prosecute him because of his age and therefore turned him over to immigration officials, who returned him to Colombia shortly thereafter. He spoke no English, and no inquiry was made by the government as to his value as a witness. The district court concluded that petitioner had failed to show any possible prejudice caused by the deportation of Danies-Ocampo and, accordingly, denied the motion to dismiss (Pet. App. 8a–12a).

3. The court of appeals affirmed (Pet. App. 17a–24a). It held that the federal wiretapping statute protects radio transmissions only when the speaker has a subjective expectation of privacy that is objectively reasonable (*id.* at 17a–20a). The court upheld, as supported by the evidence, the district court's finding that petitioner had no actual expectation of privacy and also held that the use of a radio in this case made it objectively unreasonable for petitioner to expect that his

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[3] 18 U.S.C. 2511(2)(b) provides:

> It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

words would be heard only by the target of his communication (*id.* at 20a–21a). Thus, the court held that no evidence was obtained in violation of Title III.[4]

The court also held that the deportation of Danies-Ocampo before petitioner's counsel had an opportunity to interview him did not violate petitioner's rights (Pet. App. 23a–26a). It found, in response to petitioner's petition for rehearing, that the government's decision to deport was not intended to deprive petitioner of any evidence and that petitioner had failed to show how the missing alien "would have been likely to offer meaningful evidence not obtainable from other available witnesses" (*id.* at 26a).

ARGUMENT

1. Petitioner contends (Pet. 8–11) that the courts below should have granted his suppression motion because the intercepted point-to-point radio transmissions were protected communications under the federal wiretap statute, and therefore the FCC's monitoring and disclosure to the Coast Guard of the transmissions were forbidden. The court of appeals, however, properly interpreted the wiretap statute as not protecting petitioner's transmissions.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 applies only to "wire" or "oral" communications. See 18 U.S.C. (& Supp. IV) 2511. Petitioner's radio transmissions could only be oral communications, which are protected under the statute only if "uttered by a person exhibiting an expectation that such communication is not subject to interception under

[4] Because the court of appeals concluded that Title III did not apply to petitioner's radio transmissions, it did not consider the district court's alternative holding that the FCC's monitoring in this case complied with the exception to the prohibitions in Title III for FCC monitoring contained in 18 U.S.C. 2511(2)(b).

circumstances justifying such expectation." 18 U.S.C. 2510(2). As the court of appeals correctly held (Pet. App. 19a), the statute's protection is limited to communications satisfying two independent requirements: the speaker must have an actual, subjective expectation of privacy, and that expectation must be objectively reasonable. See, *e.g.*, *Holman* v. *Central Arkansas Broadcasting Co.*, 610 F.2d 542, 544–545 & n.3 (8th Cir. 1979); *United States* v. *McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978). See also S. Rep. No. 1097, 90th Cong., 2d Sess. 89–90 (1968). Petitioner's transmissions satisfied neither requirement.

With regard to his subjective expectation, petitioner argues (Pet. 9) that his use of a code to conceal the nature of his conversation was an insufficient basis for the courts below to conclude that he lacked an actual expectation of privacy. Petitioner does not challenge the use by the court of appeals (Pet. App. 20a) of the "clearly erroneous" standard for reviewing the district court's finding on this issue. Instead, he argues that the court improperly emphasized his use of a code during the transmissions. But the use of a code is clearly probative of whether petitioner expected his transmissions might be overheard. Moreover, the court of appeals also relied upon petitioner's failure to identify himself or his station and his periodic switching of frequencies during his transmissions as additional, strong evidence in support of the district court's finding on this issue. Neither court committed error in this regard, and, in any event, whether the finding of the district court on the issue of subjective expectation was clearly erroneous is not an issue warranting review by this Court.

Petitioner also had no reasonable expectation of privacy in these illegal transmissions. He argues (Pet. 10) that the court of appeals erred in holding that simply because his radio transmissions could be intercepted no reasonable expectation of privacy attached to them. Pe-

titioner, however, ignores the crucial fact that his transmissions were illegal. He was using land-restricted frequencies to make point-to-point communications at sea. In order for any reasonable expectation of privacy to attach with respect to private radio communication, at a minimum "the voice must be legally on the air; otherwise one who hears and especially the Federal Communications Commission, may make full disclosure." *United States* v. *Sugden*, 226 F.2d 281, 285 (9th Cir. 1955), aff'd, 351 U.S. 916 (1956).[5]

2. Petitioner further claims (Pet. 12–13) that his rights to due process and compulsory process were violated by the return to Colombia of a juvenile illegal alien who was a participant in the smuggling operation. The decision of the court of appeals, however, is completely consistent with this Court's recent decision in *United States* v. *Valenzuela-Bernal*, No. 81–450 (July 2, 1982), and therefore warrants no review by this Court.

In *Valenzuela-Bernal*, this Court considered the identical issue raised by petitioner and held that no constitutional rights are violated if the government acts in good faith in exercising its statutory duty to deport illegal aliens promptly, unless the defendant can make a "plausible showing" that the deported witnesses would

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[5] The court in *United States* v. *Sugden*, *supra*, was interpreting 47 U.S.C. 605, which is a forerunner of Title III. Petitioner argues (Pet. 10–11) that under Section 605, which he claims is broader than Title III, his transmissions were protected. First, as the court of appeals held in this case, Section 605 begins with the phrase "'[e]xcept as authorized by [Title III],'" and therefore its protection is coextensive with Title III (Pet. App. 21a–22a). Second, even assuming that Section 605 does protect oral communications more broadly than Title III, *Sugden* makes clear that even under Section 605 petitioner's "outlaw broadcasts" are entitled to no protection. 226 F.2d at 285.

supply non-cumulative testimony that is sufficiently material and favorable to the defendant to create a "reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *United States* v. *Valenzuela-Bernal*, *supra*, slip op. 14–15.

The court of appeals in this case accurately anticipated this Court's decision in *Valenzuela-Bernal*. Initially, it considered the government's motive in deporting the illegal alien and found that it was motivated strictly by a humanitarian desire to return the juvenile promptly to his own country. See *United States* v. *Carrillo-Frausto*, 500 F.2d 234, 235 (9th Cir. 1974). The court then considered whether petitioner had been prejudiced by the deportation of this single witness. It concluded that petitioner had been unable to "show that the deported witness would have been likely to offer meaningful evidence not obtainable from other available witnesses." Pet. App. 26a; *United States* v. *Avila-Dominguez*, 610 F.2d 1266, 1270 (5th Cir. 1980). Since this standard is at least as protective of petitioner's rights as that adopted in *Valenzuela-Bernal*, the decision warrants no review by this court.[6]

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[6] The determination by the court of appeals that there was no prejudice to petitioner is clearly correct. Petitioner speculates (Pet. 12–13) that the deported witness might have been able to provide evidence concerning the search, the destination of the cargo or the extent of petitioner's participation in the charged crimes. However, the deported alien was not travelling on the same ship as petitioner, nor was he present when the arrests and search took place aboard the *Judith Lee Rose*, because that ship had fled the scene when the Coast Guard approached. Also, he was the only person deported out of the 21 people arrested on board the two ships. Petitioner has made no showing at all as to what, in particular, the non-English speaking 17 year old could have stated that was not available through other witnesses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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